No. 06-219

# In The Supreme Court of the United States

CHARLES WILKIE, et al.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE OREGON CATTLEMEN'S ASSOCIATION AND NEVADA N-6 GRAZING BOARD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

The Oregon Cattlemen's Association and the Nevada N-6 Grazing Board are interested in the question whether the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, bars a plaintiff's Fifth Amendment claim against individual Federal officers under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), where the alleged violations are unrelated to final agency action, and where there is no alternative remedy declared by Congress to be an equally effective substitute for recovery directly under the Constitution.

Formed in Baker, Oregon in 1916, the Oregon Cattlemen's Association represents ranching interests in Oregon. It exists to promote environmentally and socially sound industry practices, improve and strengthen the economics of the industry, and protect industry communities.

The Nevada N-6 Grazing Board represents the interests of Federal and other public lands ranchers in Nevada. The Board advocates on their behalf to ensure that livestock grazing remains a viable use of the Federal lands. It also educates the public about the ranching industry.

In the American West, the Federal Government regulates and is a neighbor to the vast majority of livestock ranching operations. Regular interaction between private individuals and government officials is a way of life. The relationship between the two is ideally and often symbiotic. This case, however, concerns the rare occasion

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[1] This brief is filed with the parties' consent. This brief is authored solely by counsel for *amici curiae*, and no party made a monetary contribution to the preparation or submission of the brief.

where that balance has been lost. It involves a claim by Respondent Frank Robbins, a rancher and entrepreneur, alleging certain Bureau of Land Management (BLM) employees violated his Fifth Amendment rights after he refused to grant the BLM a right-of-way over his ranch. It is for this sort of conduct that this Court held in *Bivens* that citizens may pursue damages against Federal officers.

Affirming the decision below on this issue will clarify the appropriate limits on the relationship between Federal land managers and landowners. Affirming will encourage government officials to discharge their duties according to the law and will give full effect to the guarantees of the Fifth Amendment. Moreover, affirming will contribute to the continued opportunity for harmonious relationships between the government and private landowners. Reversal on this issue, on the other hand, potentially subjects landowners to unchecked unconstitutional conduct by rogue individuals under the color of government authority. Reversal will thereby erode state law and Fifth Amendment protections.

## SUMMARY OF ARGUMENT

The Administrative Procedure Act (APA) does not bar Respondent's *Bivens* claim against the individual agency officers for violations of his Fifth Amendment rights. First, Petitioners have mischaracterized Respondent's claim as solely challenging an agency action. Several of the allegations in Respondent's complaint do not relate to a final agency action. Rather, they concern the extraconstitutional conduct of Federal agency officers, for which the

APA provides no forum for seeking a remedy. Thus, Respondent can only seek damages.

Second, the APA is not the sort of comprehensive regulatory scheme that this Court has held will preclude a *Bivens* claim. The remedial mechanisms of APA judicial review require agency action – something lacking here. Judicial review of those actions is limited to very narrow inquiries that would not disclose the violations alleged by Respondent. Simply because the BLM took some agency actions does not mean that its officers' conduct is necessarily tied to those actions. Much of the conduct complained of would not supply the grounds for setting aside the BLM's formal decisions to revoke the right-of-way and public lands privileges Respondent had previously enjoyed.

Third, in those cases in which the APA has been held to preclude a *Bivens* claim on alternative-remedy grounds, Congress had provided or authorized an underlying regulatory scheme. The APA provided the mechanism for judicial review of decisions resulting from that process. The oft-cited example is that of a Federal employee suing his or her employer for damages associated with alleged constitutional violations connected to employment-related decisions. The employee has a remedial mechanism to seek various forms of relief, which does not typically include damages. If the administrative process leaves the employee dissatisfied, he or she may seek the available remedies in court under the APA. But because they have *some* remedial mechanism, *Bivens* is unavailable. Here, there is no such underlying regulatory scheme that could provide the alternate remedial mechanism. That the APA exists to review agency action is no cause to believe that Congress intended it to foreclose recovery for violations

unrelated to agency action. In such cases, where it is "damages or nothing," this Court has applied *Bivens*.

Finally, this case presents no other "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. At its core, this case is indistinguishable from *Bivens* and the other cases in which this Court and the circuit courts have provided plaintiffs an avenue for seeking relief. Affirming will not impede government officials in the discharge of their duties. Respondent seeks no extension of *Bivens* or any application of it to a new category of defendants. The defendants in this case are in no special position such that permitting a *Bivens* claim to proceed might compromise the ability of BLM officials to perform their duties. Permitting a *Bivens* claim to proceed here will deter any temptation to abuse government authority and will protect important constitutional rights. Thus, when the analysis concludes, *Bivens* is fully applicable.

## ARGUMENT

### The Administrative Procedure Act Does Not Preclude A *Bivens* Claim Alleging Fifth Amendment Violations By Federal Officers Where Those Violations Do Not Relate To Final Agency Action And Where There Is No Alternative Remedy.

In *Bivens*, the Court held that plaintiffs may seek damages from Federal officers for those officers' alleged violations of the plaintiff's constitutional rights. *See Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 (2001) (core holding in *Bivens* recognizes in "limited circumstances a claim for money damages against federal

officers who abuse their constitutional authority"). *Bivens*' purpose was twofold: to deter unconstitutional conduct by Federal officers, *id.*, at 69, and to provide a remedy for constitutional violations where one did not otherwise exist, *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). Relevant here, the Court has articulated two instances in which a *Bivens* claim is unavailable to a plaintiff: (1) when defendants can demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress," and (2) when defendants can prove "that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson* v. *Green*, 446 U.S. 14, 18 (1980) (quotations omitted).[2]

Neither situation presents in this case. Indeed, this case presents a context indistinguishable from the contexts presented in the cases where this Court and the circuits have permitted a *Bivens* claim to proceed. As in *Bivens*, as in *Davis*, as in *Carlson*, there is no underlying regulatory scheme for which the APA could provide an alternate, equally effective remedy.

The Petitioners contend, however, that the APA provides all the remedy to which Petitioner is entitled. This argument is fundamentally flawed. The incorrectness of the Petitioners' arguments is found in their mischaracterization of the Respondent's claims, their misinterpretation of this Court's *Bivens* jurisprudence, and their

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[2] The Court noted in *Bivens* that it was not dealing with an explicit prohibition against the relief sought, 403 U.S. at 397, and in *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988), the Court noted this as another instance in which a *Bivens* action would be precluded. Petitioners do not claim in this appeal that this justification is applicable.

misapprehension of the regulatory context in which this case finds itself before the Court.

## I. Respondent Alleged Violations By Individual Federal Officers Of His Fifth Amendment Rights, Not Solely That He Is Aggrieved By Agency Action.

Proper characterization of Respondent's allegations is critical to deciding the question addressed in this brief. Petitioners argue that the APA precludes Respondent's *Bivens* claim against the Federal officers in part, because, all of Respondent's claims relate to agency action for which the APA provides the sole mechanism for seeking a remedy. So, the theory goes, the availability of judicial review for agency actions – including those actions found to be contrary to a constitutional right, 5 U.S.C. § 706(2)(B) – precludes a *Bivens* claim. *See Chilicky*, 487 U.S. 412; *Moore* v. *Glickman*, 113 F.3d 988 (9th Cir. 1997) (availability of judicial review under APA precludes *Bivens* cause of action alleging constitutional violations related to agency decision to remove plaintiff from employment position); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146 (9th Cir. 1991) (APA precludes *Bivens* claim against agency rulemakers where, in part, there is "an explicit remedy for unconstitutional rulemaking in the APA"). This theory is premised in part on an erroneous view of the claims Respondent has presented.

It is undisputed that the BLM in this case sought a right-of-way over Respondent's property. And it is undisputed that Respondent refused to grant the BLM a right-of-way. So, Respondent alleged, in an attempt to secure the right-of-way for the BLM, and because they could not do so or chose not to employ the proper means to do so, the

individual officers used various tactics aimed at forcing him to do so. In so doing, Respondent alleged, the officers violated his Fifth Amendment rights. Some agency actions affecting Respondent were taken. The court of appeals noted that these claims were properly pursued in an administrative proceeding. *Robbins* v. *Wilkie*, Pet. App. 82a. However, the court of appeals also noted that several of his claims related to the officers' intentional misconduct that was unrelated to agency action. *Id.* These claims, the court wrote, were "properly within the scope of a *Bivens* claim." *Id.*

This was entirely correct. Despite the Petitioners' contentions, not all of Respondent's claims "relate[] to the same final agency action – the cancellation of the right-of-way granted to respondent's predecessor at the ranch – and to respondent's refusal to grant a reciprocal right-of-way to the government." Brief for Petitioners 33. Nor is the sole basis of his claim the allegation that an agency decision has denied him access to public lands or privileges thereon. *See id.* at 44. Nor can the claims be characterized as non-final agency action. *See id.* at 34 (citing *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997)).

First, Respondent's refusal to grant the right-of-way has nothing to do with any agency action. He was not obligated to grant the right-of-way, and the agency did not obtain it. Again, the individual officers allegedly engaged in coercive, extortionate conduct aimed at forcing him to grant the easement. In the process, the individual officers, acting under color of Federal authority, allegedly violated Respondent's Fifth Amendment rights. This conduct is wholly separate from and does not relate to any agency action.

Second, those agency actions that were properly the subject of an administrative proceeding were but small parts of Respondent's claims. The complaint is replete with allegations that other actions by the individual officers infringed upon protected Fifth Amendment rights. These actions are wholly distinct from any agency action.

To the extent Petitioners argue that the conduct at issue in this case somehow relates to non-final agency action, Brief for Petitioners 34, this, too, is incorrect. The conduct complained of here would not lead to any agency action that could be reviewed. The Court explained the concept of finality in *Bennett* v. *Spear*, stating that the action must "lead to the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature . . . [a]nd second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-78 (citation omitted). No agency action would flow from the alleged constitutional violations. The alleged conduct stems from Respondent's refusal to grant an easement over his land. Simply because the conduct involved agency officers who may have been involved in the BLM's decision to cancel Respondent's right-of-way and public lands privileges does not magically transform the officers' conduct into agency action. The cancellation of Respondent's right-of-way and his privileges on public lands are merely collateral, unrelated acts by the BLM.

BLM officials are, of course, authorized to seek reciprocal rights-of-way from landowners in exchange for a right-of-way over public lands. Mere proximity to Federal land does not bring the landowner within the sphere of BLM regulation. In this sense Respondent is not an employee whose relationship with a Federal employer is

governed by an elaborate administrative scheme designed to remedy constitutional violations. *See Bush* v. *Lucas*, 462 U.S. 367, 386 (1983) (Federal employee's *Bivens* claims precluded by elaborate administrative system created by Congress which "provide[d] meaningful remedies for employees who may have been unfairly disciplined. . . ."). Nor was the conduct related to a regulatory scheme that produced an adverse decision against Respondent. *See, e.g., Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006) (denying *Bivens* claim for alleged unconstitutional acts connected to adverse inspection decisions). Therefore, only the Constitution protects Respondent from abusive government conduct, just as the Constitution was the sole protection in *Bivens*, *Davis*, and *Carlson*. If BLM officials may enjoy unchecked disregard of landowners' constitutional rights, the protections embodied in the Constitution become effectively meaningless. The allegedly coercive or extortionate conduct effectively thus becomes a legitimate tool in BLM's belt. This is precisely what *Bivens* was designed to protect against.

## II. The APA Makes Reviewable Only Agency Actions, Not Actions For Constitutional Violations Against Individual Government Officers, Where That Conduct Is Unrelated To Agency Action.

Petitioners assert that the APA provides the sort of "comprehensive scheme for challenging agency action that precludes a *Bivens* remedy with respect to challenging *agency actions* like those at issue here." Brief for Petitioners 31 (emphasis added). They add that the absence or limited nature of a remedy under the APA does not necessarily

mean that *Bivens* should be available to provide one. *Id.* at 34-35. As a general statement, this may be true. Before the availability or nature of a remedy becomes relevant, it first must be asked whether the APA even provides Respondent the forum to seek any remedy. The answer is, of course, no.

The APA makes reviewable two types of actions: (1) "[*a*]*gency action* made reviewable by statute" and (2) "final *agency action* for which there is no adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). "Agency action," as it is defined in the APA, "includes the whole or part of an *agency* rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13) (emphasis added). The APA directs a court to "hold unlawful and set aside *agency action*, findings, and conclusions" found to be contrary to constitutional right. 5 U.S.C. § 706(2)(B) (emphasis added). So, by its plain text, the APA allows review only of *agency action* for which there is no adequate remedy in court.

Because APA review is limited to review of agency action, it follows that APA review does not include claims against officers whose conduct is unrelated to an actual agency decision. Thus, *Bivens* provides a forum for a plaintiff to seek damages. *Collins* v. *Bender*, 195 F.3d 1076 (9th Cir. 1999), illustrates this distinction. *Collins* was brought by a Drug Enforcement Agency employee placed on administrative leave due to allegations of potentially dangerous conduct. 195 F.3d at 1077. Upon commencement of Collins' leave, Collins' supervisor, Bender, ordered DEA agents to retrieve from Collins' home government property and Collins' personal firearms. *Id.* Collins was eventually terminated. *Id.* In his *Bivens* complaint, Collins alleged that the agents violated certain of his constitutional rights. *Id.*

Bender, the supervisor, claimed that the search was part of a "personnel action," for which a remedy would lie pursuant to the Civil Service Reform Act. *Id.* at 1078. The district court agreed. *Id.* The court of appeals reversed, holding that the definition of "personnel action" did not include the search of the employee's home for his personal property. *Id.* at 1080. In other words, simply because there was some relationship, parts of which were covered by the CSRA, not every act done by supervisor to employee was so covered.

Importantly, the court observed that "Congress intended for the CSRA to be the sole mechanism through which employment disputes are settled," not to "deputize government supervisors as chieftains of security forces that police the private lives of their employees subject only to some administrative oversight" or to "shoehorn into the CSRA every odd occurrence where a supervisor forms and leads such a renegade posse." 195 F.3d at 1080.

Other courts, in different but analogous contexts, have also noted the distinction between conduct related to agency action and conduct not related to agency action. *See Zephyr Aviation, LLC* v. *Dailey*, 247 F.3d 565, 571-72 (5th Cir. 2005) (declining to impose judicial exhaustion requirement on plaintiff's *Bivens* claim of extra-procedural and unconstitutional actions by FAA inspectors where conduct complained of did not "implicate an FAA order that is currently in place" and where administrative appeal process would not provide the relief sought);[3]

[3] The court noted that based on the pleadings, the only question was whether the Aviation Act required a plaintiff to exhaust administrative remedies before filing a *Bivens* claim, and not whether it displaced a *Bivens* claim altogether. 247 F.2d at 570 n.5.

*Americopters, LLC* v. *Federal Aviation Administration*, 441 F.3d 726, 737-38 (9th Cir. 2006) (declining to apply collateral attack doctrine on plaintiff's constitutional claims against FAA where no order was then pending, noting that "[a] damages claim in district court is not fairly characterized as an 'end-run' around an order – or the procedures and merits surrounding it – if the order is no longer pending or, for lack of a better word, 'live'"); *Ballasteros* v. *Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) (REAL ID Act limited Federal district court's review of Board of Immigration Appeals' removal orders, and "no remedy for the alleged constitutional violations would affect the BIA's order for removal," therefore, the court could not consider Fourth Amendment claim – "[a]ny remedy available would lie in a *Bivens* claim"); *District Props. Assocs.* v. *The District of Columbia*, 743 F.2d 21, 26 (D.C. Cir. 1984) (where District of Columbia APA granted review to "affirm, modify, or set aside the order or decision complained of," claims against agency officials that were "relatively unrelated to the formal decisionmaking process" were outside scope of judicial review provision).

Much like in the cases just cited, the conduct at issue in this case would not supply any grounds for setting aside the BLM actions. Assuming the actions at issue are the BLM's cancellation of the right-of-way and Respondent's other public lands privileges, the nature of judicial review would provide no forum for the constitutional violations to be addressed. Judicial review is confined to the record. *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-32 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). The APA provides no opportunity for discovery, no trial, and no introduction of evidence beyond what the agency compiled during its decisionmaking

process. To the extent the Petitioners claim that the IBLA would provide a forum for the constitutional claims to be addressed, this is incorrect. The IBLA does not have jurisdiction to consider Fifth Amendment violations against agency officers where that conduct is not connected to an agency action. It decides appeals to the Department of the Interior from decisions related to the use and disposition of public lands and their resources, and a handful of items not relevant in this case. *See* 43 C.F.R. § 4.1 (2006). IBLA panels have declined to consider constitutional claims or provide relief for alleged violations by officers of individuals' constitutional rights. *See Rivers Edge Trust*, 166 IBLA 297 (2005) ("the Board, as a quasi-judicial body within the Department of the Interior, has no authority to adjudicate whether constitutional rights have been violated, or to afford any relief therefrom"); *see also United States* v. *Miller*, 165 IBLA 342 (2005); *Rainer Huck, et al.*, 168 IBLA 365 (2006); *Organized Sportsmen of Lassen County*, 124 IBLA 325 (1992); *Laguna Gatuna, Inc.*, 131 IBLA 169 (1994); *Carey Horowitz*, 138 IBLA 330 (1997).

Because the administrative adjudicatory body could not hear the claims or provide any relief, the district court, reviewing the administrative record, would also not be able to hear the claim or provide relief. *See Transcontinental Gas Pipe Line Corp.*, 423 U.S. at 332 ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Hence, the APA presents no option for bringing Respondent's claims or evidence, let alone an alternate remedy.

## III. There Is No Underlying Comprehensive Regulatory Or Remedial Scheme For Which The APA Could Provide A Remedy Or Be Viewed As An Equally Effective Substitute For Recovery Directly Under The Constitution.

A coherent theme strings together the decisions of this Court and the circuits declining to extend *Bivens*: the existence of an underlying regulatory scheme which includes the availability of judicial review. Justice O'Connor captured this theme in *Chilicky* and summarized it thusly: "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." 487 U.S. at 423. It is this theme the Petitioners say is present here. According to them, APA is yet another example of a comprehensive regulatory scheme with remedies – however inadequate – that precludes a *Bivens* claim.

Petitioners' argument fails here. Petitioners point out that section 706(2)(B) of the APA allows a court to set aside agency action that is contrary to a constitutional right. They argue that "Respondent was entitled, therefore, to raise any constitutional challenge he may have had to petitioners' actions in a suit of judicial review under the APA. . . ." Brief for Petitioners 35. But it is clear that Respondent could not have invoked the jurisdiction of the Federal district courts because there was no action to review. Additionally, the APA is far from the comprehensive regulatory scheme that this Court and the circuits hold will preclude a *Bivens* claim. The Petitioners' argument otherwise is flawed for two reasons. First, the APA is

not a stand-alone regulatory scheme that would provide the alternative remedy necessary to preclude a *Bivens* claim, and no authority cited by the Petitioners relied solely on the APA to preclude a *Bivens* claim. Second, the APA is not the remedial component of an underlying regulatory scheme, which is present in – and critical to – every single case the Petitioners cite.[4]

The Petitioners claim that "those circuits that have confronted the issue have held that the availability of relief under the APA generally precludes a *Bivens* action for damages." Brief for Petitioners 31. That is not the complete story. Petitioners argue also that "when a comprehensive statutory remedial scheme exists, it does not matter whether a particular plaintiff will have a remedy under that scheme." *Id.* at 31. This is true, but it does not apply to this case: There is no comprehensive statutory remedial scheme. In each case the Petitioners cite, there existed an underlying regulatory scheme, and the agency decisions which encompassed the complained-of conduct produced as part of that scheme were subject to judicial review under the APA. The fact in some of those cases that the remedy was in plaintiff's mind less desirable did not change the analysis. Because Congress had provided an alternative remedy, which it viewed as equally effective, the lack of plaintiff's desired remedy was no reason for the court to create one for them.

In *Sinclair* v. *Hawke*, 314 F.3d 934 (8th Cir. 2003), the court followed *Bush* v. *Lucas* and *Schweiker* v. *Chilicky*,

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[4] To the extent the Petitioners argue that the Interior Board of Land Appeals (IBLA) provides the underlying remedial scheme for hearing complaints like Respondent's, this is incorrect. IBLA jurisdiction is quite limited. *See* discussion of IBLA jurisdiction, *supra*.

and dismissed a *Bivens* action by the owner of an insolvent bank against the Comptroller General. The court held that the comprehensive regime regulating banks, plus the availability of APA judicial review for adverse decisions precluded the suit. 314 F.3d at 942. Similarly, in *Nebraska Beef, supra*, the court dismissed a *Bivens* claim, in part, because "the USDA has promulgated a comprehensive regulatory scheme pursuant to the [Federal Meat Inspection Act] that includes the right to judicial review under the APA." 398 F.3d at 1084. In *Miller* v. *United States Dep't of Agric.*, 143 F.3d 1413 (11th Cir. 1998), the court held that *Bivens* was unavailable to a Federal worker challenging his termination decision because that termination decision was subject to judicial review under the APA. 143 F.3d at 1416. In *Sky Ad, supra*, the court denied a *Bivens* remedy "because the presence of an explicit remedy for unconstitutional rulemaking in the APA, Congress' rejection of tort remedies for unconstitutional rulemaking in the [Federal Tort Claims Act], and the overall unprecedented nature of appellants' tort theory" supplied the special factors counselling hesitation. 951 F.2d at 1148. In *Sky Ad*, the rulemaking provisions of the APA were the underlying regulatory scheme. The APA provided for review of unconstitutional rulemaking. There is no corresponding scheme in this case.

It is clear that the absence or imperfectness of a remedy will preclude a *Bivens* claim when there is a comprehensive regulatory scheme in place. In *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272 (10th Cir. 1991), the court denied *Bivens* relief because "Congress has provided a comprehensive procedure to address postal employees' constitutional claims arising from their employment relationship with the USPS. . . ." 951 F.2d at

275-76. *Jones* v. *TVA*, 948 F.2d 258 (6th Cir. 1991), held similarly that as a TVA employee covered by the Civil Service Reform Act, the plaintiff's *Bivens* claim was barred. 948 F.2d at 264. The court noted that "even if no remedy at all has been provided by the CSRA, courts will not create a *Bivens* remedy." *Id.* This statement came in the context of *some* remedial structure.

In *Moore* v. *Glickman, supra*, the Ninth Circuit refused to apply *Bivens* to an employee whose termination decision was subject to APA review. Again, however, the APA was not the sole regulatory scheme at issue. There was an elaborate administrative scheme under which the employee could seek review of the termination decision. The fact that the employee thought the available remedies incomplete was of little effect, however, since the administrative system provided "an alternative scheme and some indication that Congress deliberately elected not to include complete relief." 113 F.3d at 994 (quoting *Chilicky*, 487 U.S. at 423). And in *Saul* v. *United States*, 928 F.2d 829 (9th Cir. 1991), *Volk* v. *Hobson*, 866 F.2d 1398 (Fed. Cir. 1989), cert. denied, 490 U.S. 1092 (1989), and *Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc), there existed *some* administrative mechanism for addressing complaints of constitutional violations. Here again, however, neither the APA nor any other regulatory scheme has been provided.

The circuits have properly grasped the distinction between claims for which *Bivens* is available, and those for which it is not. In *Chilicky*, for instance, Congress had provided social security disability claimants with a fairly extensive administrative appeals process, which included the right of judicial review. *See* 487 U.S. at 424. Thus, a claimant could assert constitutional violations in an effort

to recover benefits. *Id.* Because Congress had spoken to the matter of remedies, the Court deferred to that body's judgment.

The Court's explanation of the issue in *Bush* v. *Lucas*, 462 U.S. 367 (1983), clearly identifies the relevant inquiry:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

*Bush*, 462 U.S. at 388. In *Bush* the Court declined to provide a *Bivens* cause of action to a Federal employee because his claims "ar[ose] out of an employment relationship that [was] governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States. . . ." 462 U.S. at 368. After being reassigned, the employee made several statements that were "highly critical of the agency" with which he was employed. *Id.* at 369. He was demoted. *Id.* at 370. The employee pursued the administrative appeal process, and was eventually reinstated with full back pay and retroactive seniority. *Id.* at 372. Under the law then in effect, he could have sought judicial review had the administrative process not resolved in his favor. *Id.* at 387. *Bivens* was unavailable to the plaintiff, "[g]iven the history of the development of civil service remedies and the comprehensive nature of the remedies currently available. . . ." 462 U.S. at 388.

Contrast *Bush* and *Chilicky* with *Davis* v. *Passman*, *Carlson* v. *Green*, and *Bivens* itself. In *Davis*, the terminated employee had no congressionally-provided remedial mechanisms: "When § 717 was added to Title VII to protect Federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service." *Davis*, 442 U.S. at 247. Importantly, the Court observed that "of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Id.* at 248. In *Carlson*, the Court found that even with the existence of the Federal Tort Claims Act, *Bivens* remained available to a plaintiff seeking damages for Eighth Amendment violations.[5]

*Bivens* counsels a similar result. Mr. Bivens alleged that agents of the Federal Bureau of Narcotics, acting under claim of Federal authority, entered his abode, arrested him, manacled him in front of his wife and children, and threatened to arrest the whole family. 403 U.S. at 389. The agents then took Mr. Bivens to the courthouse, interrogated him, booked him, and subjected him to a visual strip search. *Id.* In holding in Mr. Bivens' favor, the Court identified, among other rationales, the fact that the Court faced no "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397. Congress had provided no such remedy. As

[5] It does not appear from the opinion that there was any underlying regulatory scheme designed by Congress to provide a remedial mechanism for those violations.

Justice Harlan put it, "[f]or people in *Bivens*' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

This Court's cases instruct that where there is no underlying regulatory scheme, where there is no congressionally provided alternative remedy – where it is "damages or nothing" – *Bivens* affords plaintiffs the opportunity to seek a remedy for constitutional violations. Even in the cases declining a *Bivens* remedy, the Court has noted that where it is "damages or nothing," *Bivens* is available. *See Malesko*, 534 U.S. at 69; *Chilicky*, 487 U.S. at 425-27. It was, in significant part, *because* of the existence of an alternative remedy that *Bivens* was unavailable for the plaintiffs in *Bush* and *Chilicky* and *Malesko*.

As the court of appeals observed in this case, some of the events involved agency actions for which *Bivens* was unavailable. But for other conduct, no congressionally-provided scheme regulated the relationship between Respondent and the BLM officials. In such a case, *Bivens* is available to vindicate the important protections at stake.

## IV. There Are No Other "Special Factors Counselling Hesitation In The Absence Of Affirmative Action By Congress."

Neither the existence of the APA, nor the position of the Petitioners, nor anything about this case provides the "special factors counselling hesitation in the absence of affirmative action by Congress." First, applying *Bivens* here is hardly the radical expansion of *Bivens* "in direct contravention of this Court's precedents and principles of judicial restraint" as claimed by Petitioners. Indeed, it is fully consistent with this Court's *Bivens* jurisprudence.

There is no alternate remedy nor any underlying regulatory scheme that would indicate Congress intended the APA to substitute for recovery directly under the Constitution.

Second, a holding of this Court that the APA does not preclude Respondent's *Bivens* claims will not impede BLM officials as they discharge their duties any more than Mr. Bivens' claim against the narcotics officers impeded law enforcement officials' ability to discharge theirs. Claims that if this Court affirms the court of appeals' decision, government officials will become "reticent" or "downright afraid" to perform their job duties, *see* Brief of *Amici Curiae* National Wildlife Federation, et al. 5, are simply unfounded. Qualified immunity still exists for those agents who operate within the bounds of the law, and this is an appropriate safeguard. *See Carlson*, 446 U.S. at 19.

Third, in the vast expanse of the West, personal relationships necessarily develop between agency officials and landowners. BLM officials in the West often live in or near the very communities in which the ranchers live. This relationship provides the deterrence justification articulated in *Carlson*. Not only will a government official be more likely to conform his or her conduct to the Constitution, *Carlson*, 446 U.S. at 21, but, perhaps, if each person, landowner and government official alike, knows he or she is personally accountable, mutual respect has a better chance of prevailing.

Finally, the interests at stake far outweigh the potential liability officials might face. *Bivens* acts as a check on abusive governmental behavior where one does not otherwise exist. Allowing a *Bivens* claim to proceed here will say nothing to government officials except that they must

conform their actions to the Constitution, as must every other Federal employee. *See Davis*, 442 U.S. at 246 ("All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it") (quoting *Butz* v. *Economou*, 438 U.S. 478, 505 (1978)) (internal quotation omitted).

## CONCLUSION

In a case such as this, where there is no underlying regulatory scheme, where the APA provides no alternative remedy for the violations alleged, and where there are important constitutional protections at stake, *Bivens* is the only mechanism available to vindicate those rights. Affirmance requires no extension of *Bivens* and no application of it to a new set of defendants. Therefore, the APA does not preclude Respondent's *Bivens* claim. The decision of the court of appeals should be affirmed.

Respectfully submitted,

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